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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1332

ROBERT E. BRITT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

ROBERT E. BRITT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Robert E. Britt, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case February 28, 1975. A petition for rehearing was denied March 24, 1975.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered February 28, 1975. Petition for rehearing was denied March 24, 1975. This application is being filed within thirty (30) days from the date of denial of the petition for rehearing. [*United States v. Healy*, 376 U.S. 75, 11 L.Ed. 2d 527, 84 S.Ct. 553.]

Jurisdiction to issue the writ is invoked pursuant to the provisions of *Title 28, Section 1254(1), United States Code.*

Petitioner was convicted in the United States District Court for the Northern District of Georgia on fourteen counts of a multi-count indictment charging him with violations of *Title 18, Section 2314, United States Code.*

QUESTIONS PRESENTED

1. Whether petitioner's right, afforded by the Fourth Amendment, to be secure against unreasonable searches and seizures, was violated by the execution at 1819 Peachtree Road, Atlanta, Georgia, of a search warrant authorizing search of premises at 3379 Peachtree Road?

2. Whether petitioner was a "person aggrieved" by search and seizure of corporate premises of which corporation he was a major stockholder and chief executive officer?

3. Whether the Fifth Circuit Court of Appeals, in affirming the conviction of petitioner, entered a decision contrary to this Honorable Court's decisions in *Jones v. United States*, 362 U.S. 257, and *Mancusi v. De Forte*, 392 U.S. 364?

4. Whether the Fifth Circuit Court of Appeals, in affirming the conviction of petitioner, entered a decision actually in con-

flict with its earlier decision in *Henzel v. United States*, 5 Cir., 296 F.2d 650, and which decision had carefully applied this Honorable Court's holding in *Jones v. United States*, supra?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, Section 2314, United States Code, so far as material to this application, provides:

> *"Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting*
>
> * * * * * * *
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;
>
> * * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."
>
> * * * * * * *

STATEMENT OF THE CASE

Petitioner was indicted, along with five other individuals, December 4, 1972 in the Northern District of Georgia, in a 27 count indictment charging violation of *Title 18, Section 2314, United States Code,* petitioner being named in 21 of the counts. Each count charged the defendants in nine lines with having devised a scheme for obtaining money by false pretenses, representations and promises, and causing named individuals to travel in interstate commerce in the execution of such scheme to defraud each individual of $5,000.00 or more.

A Motion to suppress evidence was heard by Honorable Richard Freeman, United States District Judge. The motion was predicated upon execution of a search warrant for

> "the premises known as Suites 777 and 870 of a building located at 3379 Peachtree Road, Atlanta, Fulton County, Georgia"

which search warrant, after being executed at the premises described, was also executed at 1819 Peachtree Road, Atlanta, Fulton County, Georgia.

After hearing Judge Freeman sustained the motion to suppress. Copy of the Court's order is appended as Appendix II.

From this order the United States filed a notice of appeal which was later dismissed. Thereafter, a Subpoena duces tecum issued on request of the United States for all of the materials which Judge Freeman had ordered returned, and a second hearing was held on a motion to quash and dismiss the Subpoena duces tecum, which Judge Freeman denied. Copy of this order is appended as Appendix III.

The charges were thereafter tried to a jury, the trial being presided over by Honorable Charles A. Moye, Jr., United States

District Judge, who admitted the items seized [which had been previously suppressed by Judge Freeman] in evidence against petitioner on a selective basis of proof offered by the Government seeking to establish that it had independent knowledge of the existence of the materials prior to issuance of a subpoena for their production.

The trial, as hereinbefore noted, resulted in petitioner being found guilty under 21 counts of the indictment, and he was sentenced to serve six (6) years on each count, the sentences to run concurrently.

Concerning Judge Moye's selective admission of the evidence the Fifth Circuit Court of Appeals stated in part:

> ". . . we question whether the government demonstrated that it had independent knowledge of the existence of the invoices *prior* to the time it requested the subpoena and although we doubt that the independent basis theory can support the government *use* of the numbered list to contact potential witnesses when most of the FBI investigation was apparently conducted during the interim between the time of seizure and suppression . . ."

However, the Fifth Circuit Court of Appeals concluded that petitioner had no standing to challenge the validity of the search and seizure at 1819 Peachtree Road, Atlanta, Fulton County, Georgia, and was not a "person aggrieved" within the meaning of ***Rule 41(e), (f), Federal Rules of Criminal Procedure***.

At the hearing on the Motion to Suppress it appeared the FBI agents were armed with

a] a search warrant describing premises at 3379 Peachtree Road, Atlanta, as property of Fitts Cotton Goods; and

b] a warrant for the arrest of Petitioner, Robert E. Britt.

Petitioner was the principal stockholder and chief executive officer of Fitts Cotton Goods. His personal desk was searched al-

though he was confined to a hospital and absent from the premises. The warrant for his arrest was not executed due to his illness.

A report made by agents of the Federal Bureau of Investigation, dated February 9, 1972, covering the search and seizure [defendant's Exhibit 5 at the hearing before Judge Freeman] listed as one item of records seized at 1819 Peachtree Road "one box of salesman records". This report then made the following significant statement:

"A review of the salesman records which are also known as distributor records, indicated *the following distributor names not previously known* [Emphasis supplied]:

C. B. ALWINE	412-835-2789	Michigan and West Virginia
LUTHER POST	301-592-8055	Maryland
WILLIAM L. BRIDGES	502-425-7912	S. Ohio
GEORGE C. CRINER	501-666-1491	Little Rock, Arkansas
ROBERT E. DAVIS	301-539-3439	Washington, D. C.
ROSCOE INBODY	405-946-9062	Oklahoma
JOSE MARQUES	089-722-2196	Puerto Rico
E. McCUSKER	215-353-2174	E. Pennsylvania
DOUGLAS McNARY	312-895-1438	Chicago, Illinois
E. J. BUDD MYERS	412-563-0942	W. Pennsylvania
JOHN NAMISAH	404-595-3459	Virginia
EDWIN A. SMITH	305-831-7217	N. Florida
L. R. STANTON	412-781-9597	N. Ohio
JAMES L. TART	919-284-2131	North Carolina
DICK TAILLON	No additional information given.	
CHARLES YESSICK	205-322-4139	Alabama"

REASONS FOR GRANTING WRIT

I. The Fifth Circuit Court of Appeals has rendered a decision which denies Petitioner rights guaranteed by the Fourth Amendment.

II. In holding Petitioner not to be a "person aggrieved" within the meaning of Rule 41(e)(f), Federal Rules of Criminal Procedure, and without standing to attack the search and seizure in question the Fifth Circuit Court of Appeals has entered a decision directly in conflict with this Court's decisions in *Jones v. United States*, 362 U.S. 257, and *Mancusi v. De Forte*, 392 U.S. 364, and in effect ignored its previous decision in *Henzel v. United States*, 5 Cir., 296 F.2d 650, which had followed and correctly applied *Jones v. United States*, supra. The law concerning standing to attack a search and seizure is, therefore, left in a conflicting and unsettled state.

I

Fourth Amendment Violation

In granting the Motion to Suppress [Appendix II] Honorable Richard Freeman recognized Petitioner's Fourth Amendment rights had been violated. The materials seized were ordered returned to Petitioner.

From this order the United States filed a Notice of Appeal to the Fifth Circuit Court of Appeals which it later dismissed.

A subpoena duces tecum thereupon issued at the request of the United States for the production of the identical evidence which had previously been suppressed. On the hearing of motion to quash the subpoena it appeared the United States

Attorney had made copies of the materials seized [and ordered by the Court to be returned], used same to prepare the subpoena duces tecum, and still had them in his possession. The Court ordered the copies turned over to defense counsel immediately. Prejudice to Petitioner, however, had already resulted. The copies had been in the United States Attorney's possession for a period of more than sixty (60) days, i.e., May 29, 1973 to August 1, 1973.

The holding of this Court in *Silverthorne Lumber Company v. United States*, 251 U.S. 385, clearly applies and calls for the grant of certiorari. In *Silverthorne*, as here, the originals were returned but copies made, utilized, and sought to be held onto by the Government. This Court stated, and in most eloquent terminology:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

In the instant case what Judge Freeman *directly* forbade was achieved by the Government *indirectly*.

II

Petitioner Had Standing to Question the Illegal Search

Departing from its philosophy announced in *Henzel v. United States*, 5 Cir., 296 F.2d 650, the Fifth Circuit Court of Appeals in the instant decision made a reverse application of "piercing the corporate veil" and denied Petitioner standing under Rule 41(e)(f), *Federal Rules of Criminal Procedure*, to question the search and seizure.

In *Henzel*, quoting from this Court's decision in *Jones v. United States*, the Fifth Circuit Court of Appeals reasoned:

> "*Two separate lines of thought effectively sustain defendant's standing in this case.* (1) The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) *Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below.*" (Emphasis supplied) 362 U.S. at 263, 80 S.Ct. at 732.

Elsewhere in the opinion, and with another quotation from *Jones*, the Court noted that "one against whom the search was directed" has standing to question validity of the search.

As the principal stockholder and chief executive officer of Fitts Cotton Goods Petitioner had requisite standing under the *Henzel* application of *Jones v. United States*. A warrant having simultaneously issued for Petitioner's arrest, obviously designed to coincide with execution of the search warrant against Fitts Cotton Goods, Petitioner clearly emerges as "one against whom the search was directed." He, therefore, had standing to challenge validity of the search independently of corporate relationship.

CONCLUSION

Petitioner, having been denied substantial rights afforded by the Constitution of the United States to persons charged with the commission of criminal offenses, and by the decisions of this Honorable Court thereunder, prays that the writ of certiorari be granted herein.

Respectfully submitted

HOSEA ALEXANDER STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

ROBERT E. BRITT, Defendant-Appellant.

No. 74-2001.

United States Court of Appeals,
Fifth Circuit.

Feb. 28, 1975.

Defendant was convicted in the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., of 14 counts of inducing individuals to travel in interstate commerce in the execution of a scheme to defraud such individuals of amounts in excess of $5,000, and he appealed. The Court of Appeals, Gee, Circuit Judge, held that defendant did not have standing to challenge validity of search and seizure at corporate premises merely because he was president of the corporation where the documents seized were normal corporate records not prepared personally by him, the area searched was a "storage area," defendant was in hospital at time of the search and had been for several months prior to it, and nothing in the record indicated that the search was directed at him rather than at corporate activity generally.

Affirmed.

1. Criminal Law Key 1134(6)

If evidence used in prosecution of defendant is admissible, it is immaterial to reviewing court and harmless to defendant that the trial court's particular rationale for admitting it into evidence cannot stand close scrutiny.

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2. Searches and Seizures Key 7(26)

Defendant did not have standing to challenge validity of search and seizure at corporate premises merely because he was president of the corporation where the documents seized were normal corporate records not prepared personally by him, the area searched was a "storage area," defendant was in hospital at time of the search and had been for several months prior to it, and nothing in the record indicated that the search was directed at him rather than at corporate activities generally. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e, f), 18 U.S.C.A.

3. Criminal Law Key 394.5(2)

Only a "person aggrieved" by an unlawful search and seizure may move for the return of the seized property and insist that it be suppressed. Fed.Rules Crim.Proc. rule 41(e, f), 18 U.S.C.A.

4. Criminal Law Key 394.5(2)

A corporate officer does not have standing to suppress illegally seized corporate records simply because he is a corporate officer.

Appeal from the United States District Court for the Northern District of Georgia.

Before DYER, MORGAN and GEE, Circuit Judges.

GEE, Circuit Judge:

Robert E. Britt was charged along with five other individuals in a 27-count indictment. He personally was named in 21 of the 27 counts, each of which charged that a specific individual was induced to travel in interstate commerce to Atlanta, Georgia, in the execution of a scheme to defraud that individual of over $5,000. Three of the six defendants plead guilty to the counts in which they were charged, one was acquitted, and the charges against another were dismissed by the government. Mr. Britt, the appellant, was convicted by a jury of 14 counts of violating 18 U.S.C. § 2314.[1]

---

[1]18 U.S.C. § 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

* * * * * * *

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;

* * * * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * * * *

Britt was the president of Fitts Cotton Goods, a company which specialized in the manufacture of diapers. In the fall of 1970, the company, which at the time was in serious financial straits, began selling distributorships in order to raise much-needed capital. A number of these distributorships were sold, including sales to each of the 27 persons listed in the indictment. According to the evidence, potential distributors would be summoned to Atlanta. There they were promised that as distributors they would have the exclusive right to a territory after training, with the resulting benefit that each would receive a five percent commission on all sales to existing business in his territory and a ten percent commission on all sales to new business which he acquired for the company. In order to induce potential distributors to purchase territories—the purchase price varied according to the size and supposed lucrativeness of the territory but ranged from $5,000 to $25,000—Mr. Britt and his co-defendants painted glowing but patently false pictures of the volume of Fitts' existing business. There is no doubt that figures shown or related to the distributorship purchasers purporting to reflect orders from active accounts currently buying from the company in a given territory were grossly exaggerated. Lists given to the purchasers supposedly containing the names of current accounts, in fact, turned out to be composed, in large part, of retailers who were out of business, were no longer doing business with Fitts, or who had never done business with Fitts to begin with. Most of the distributorship purchasers found that, contrary to what they had been led to believe, they were able to sell few, if any diapers. Most received almost nothing in commissions and, therefore, lost almost their entire investments. Naturally, Fitts never refunded anything to its defrauded diaper distributors.

An investigation was begun after a number of complaints from disgruntled distributorship purchasers were communicated to the FBI. Eventually a search warrant was obtained. The warrant was, basically, for all the business records of

Fitts Cotton Goods and named as the place to be searched the ostensible offices of the company, two suites of offices at 3379 Peachtree Road, Atlanta. When FBI agents served the warrant at 3379 Peachtree they were met by a Mr. Brewer, the comptroller of Fitts. After the agents completed their search of 3379 Peachtree, they proceeded to a second address, 1819 Peachtree. Although 1819 Peachtree was not mentioned in the warrant, the agents believed that they had the right to conduct a search there because Mr. Brewer, the comptroller, had, upon questioning, informed them of the existence of Fitts' offices at 1819, had given them permission to search there, had accompanied them to the address, and had obtained the key and opened the door for them. Mr. Britt, however, moved to suppress all records discovered at 1819 Peachtree, claiming that the search there was not a consent search since Mr. Brewer had given permission under the mistaken impression that the warrant for 3379 authorized the FBI to search all Fitts' offices, including those at 1819. The trial court, agreeing with Britt, ordered the 1819 evidence suppressed. At the same time, however, he indicated that "the government may be able to obtain the document from 1819 Peachtree Road by subpoena, warrant or other legal process if it can show that the information forming a basis for such process is in no way tainted by the illegal search and seizure."

Although a number of papers were seized at 1819 Peachtree and later subpoenaed, only two types of documents found there were used by the government in building its case against Britt. The first of these were invoices from which the government was able to calculate the exact sales volume of Fitts in the various territories—and thus dramatically demonstrate how gross were the exaggerations related to the distributorship purchasers. The second was a list which contained the names and telephone numbers of all Fitts distributors. It is undisputed that a list of Fitts distributors containing the same names but *sans* telephone numbers was seized during

the legal search[2] at 3379 Peachtree. Britt claims, however, that the list with telephone numbers was used, before it was subpoenaed, to contact previously unknown distributors. He says that all investigations based upon the numbered list were fruits of the poisonous tree and that all evidence gathered as a result of these investigations, including especially the testimony of those of the 27 distributors who were unknown to the FBI prior to the seizure, must be suppressed. We hold that all challenged evidence was properly admitted.

We shall briefly summarize the series of moves and countermoves that led to the eventual admission of the testimony of the distributors and the evidence as to sales figures, omitting several which are irrelevant to this appeal. First, appellant moved to suppress on Fourth Amendment grounds. The court granted this motion but suggested that the subpoenaing of the same evidence might be possible. Then the government subpoenaed both the invoices and the numbered distributor list. Appellant moved to quash. This motion was denied. Next followed appellant's motion for a protective order, the object of which was to insure exclusion of all evidence seized at or derived from the search at 1819, including everything subpoenaed. This was also denied. Finally, the evidence was admitted at trial over objection only after the court was convinced of the bona fides of the government's asserted independent bases for its subpoenaing of the invoices and the distributor lists. In the meantime, the government had appealed from the initial suppression order, but early on requested that the appeal be dismissed when it learned that the court would probably uphold the subpoena.

[1, 2] Fortunately, it is not our task to analyze systematically the court's response to each of these moves and countermoves and to judge whether one or some can be reconciled with another or others. We are concerned only with the ulti-

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[2] Appellant has never challenged the legality of the first search.

mate question of whether the court erred when, at trial, it admitted evidence over appellant's objections. If the evidence was admissible, it is immaterial to us and harmless to appellant that the trial court's particular rationale for admitting it cannot stand close scrutiny. Thus, although we question whether the government demonstrated that it had independent knowledge of the existence of the invoices *prior* to the time it requested the subpoena[3] and although we doubt that the independent basis theory can support the government *use* of the numbered list to contact potential witnesses when most of the FBI investigation was apparently conducted during the interim between the time of seizure and suppression, we nevertheless hold that the evidence was properly admitted because we are of the opinion that Mr. Britt did not have standing to challenge the validity of the search and seizure at 1819 Peachtree Road.

[3, 4] Only a "person aggrieved" by an unlawful search and seizure may move for the return of the seized property and insist that it be suppressed. F.R.Cr.P. 41(e) & (f). We have held that under certain circumstances a corporate officer or employee can be a person aggrieved by a search of corporate premises and a seizure of corporate property. Henzel v. United States, 296 F.2d 650 (5th Cir. 1961). The facts of this case, however, are much different from those of *Henzel*. There

> . . . the appellant was the organizer, sole stockholder and president of Chemoil Corporation. Appellant prepared much of the material seized, and this material was kept in his office along with some of his personal belongings. Although he was temporarily absent from his office when it was searched, appellant spent the greater part of every average working day there. Finally, it is undisputed that the search by the Postal Inspector was "directed at" the appellant.

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[3] We have no doubt that it demonstrated at trial that it could easily have obtained such knowledge.

Henzel, at 653. Here, although Britt was president of Fitts, he was not its sole stockholder, the documents seized were normal corporate records not prepared personally by him, and the area searched at 1819 Peachtree Road was described as a "storage area."[4] Furthermore, there is no evidence that Britt spent any of his time working in the storage area—or in any other space at 1819 Peachtree for that matter—or that any of the material seized there was taken from his personal desk or briefcase or files. He was in the hospital at the time of the search and had been for several months prior to it. Furthermore, there is nothing in the record which would indicate that the searches, either at 3379 or 1819, were directed at him rather than at corporate activity generally. Under such circumstances, we conclude that we should apply the normal rule which is that,

> When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity.

Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946), cert. denied, 331 U.S. 858, 67 S.Ct. 1750, 91 L.Ed. 1865 (1947). This rule, of course, has been tempered by the holding of the Supreme Court in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) as we explained in *Henzel*, *supra*. But it remains applicable in situations similar to the one which we here face in which a corporate officer seeks to suppress illegally-seized corporate records and claims standing essentially simply because he is a corporate officer. Neither *Henzel* nor Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d

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[4] This description, provided by FBI Agent Decker, is undisputed in the record.

1154 (1968) are contra. In both of these cases there was a demonstrated nexus between the area searched and the work space of the defendant. That nexus is absent here.

Appellant raises a number of other alleged errors. We have examined these and found them to be without merit. They are rejected.

Affirmed.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By BARBARA KREI, Deputy
New Orleans, Louisiana

(Seal)

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

October Term, 1974

No. 74-2001

D. C. Docket No. CR-27,916

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT E. BRITT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before DYER, MORGAN and GEE, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 28, 1975

Issued as Mandate: April 4, 1975.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk
U.S. Court of Appeals
Fifth Circuit

By: BARBARA KREI
Deputy
New Orleans, Louisiana
April 15, 1975

(Seal)

APPENDIX C

In the United States Court of Appeals
For the Fifth Circuit

No. 74-2001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT E. BRITT,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

Order on Petition for Rehearing

(March 24, 1975)

Before DYER, MORGAN and GEE, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk
U. S. Court of Appeals, Fifth Circuit

By BARBARA KREI
Deputy
New Orleans, Louisiana
April 15, 1975

(Seal)

APPENDIX D

Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

April 14, 1975

Hosea Alexander Stephens, Esq.
2334 National Bank of Ga. Building
Atlanta, Georgia 30303

RE: Robert E. Britt v. United States
No. A-834

Dear Mr. Stephens

Your application for stay in the above-entitled case has been presented to Mr. Justice Powell, who has endorsed thereon the following:

"Denied
L. F. P.
4/12/75."

Very truly yours,

MICHAEL RODAK, JR.
Clerk

By PAUL L. JONES
Assistant Clerk

dam

cc: The Solicitor General of the United States

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

United States
vs.
Robert E. Britt, et al.

Criminal Action
No. 27916

Order

This prosecution charges six defendants in twenty-seven counts with causing individuals to travel in interstate commerce in execution of a scheme to defraud, in violation of 18 U.S.C. § 2314.

Defendant Britt moved to suppress and for the return of certain documents seized by the government, under Rule 41(e), Fed. R. Crim. P., charging that the property was illegally seized without a warrant. A hearing was held on April 3, 1973, at which time the court heard evidence concerning the alleged illegality of the search. For the reasons set forth below, the motion to suppress must be granted.

On February 2, 1972, the government obtained a warrant for the search of the premises at Suites 777 and 870, 3379 Peachtree Road, Atlanta. Those suites were thought to be, and were stated in the warrant to be, the principal business offices of Correcto Products, Inc.; Fitts Cotton Goods; Birdseye Industries, and Baby Products, Inc. The F.B.I. agents believed that records of those businesses, Fitts Cotton Goods, Inc., in particular, would

provide evidence of the commission of the crimes charged in this indictment.[1]

Guy Decker, Special Agent, F.B.I.; Owen Forrester, Assistant United States Attorney; and three other F.B.I. agents proceeded to execute the search warrant. Upon arrival at 3379 Peachtree Road the agents asked to see defendant Britt; they were told that Britt was not there and were referred to Raymond L. Brewer, Comptroller of Fitts Cotton Goods, Inc.[2] The agents showed the search warrant to Brewer, who then called Britt and read the warrant to Britt over the telephone. Britt told Brewer that he would have to abide by the search warrant and that the agents were entitled to seize the documents.

After completing the search of 3379 Peachtree Road and seizing many documents, the agents asked Brewer if there were any other records of Fitts Cotton Goods, Inc. Brewer told the agents that there were; in response to a question as to the location of those documents Brewer told them that the other records were at the Fitts Cotton Goods office at 1819 Peachtree Road. Brewer was asked if he would accompany the agents to the 1819 office; he agreed to do so. Brewer rode to 1819 Peachtree Road with Decker, Forrester and another agent in Decker's car.

Upon arrival at 1819 Peachtree Road, Brewer obtained the key to the office from the building superintendent and let the agents into the Fitts office.

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[1] At or about the same time as they obtained the search warrant, a warrant was obtained for the arrest of defendant Britt and the agents planned to serve the warrant upon him at 3379 Peachtree Road.

[2] Brewer testified that he was being paid at that time only by Correcto Products, Inc., and that he was keping the books and records of Fitts Cotton Goods, Inc., Birdseye Industries, and Baby Products, Inc., free of charge. Whether for pay or not, Brewer was acting as the Comptroller of Fitts Cotton Goods, Inc.

Defendant Britt raises no objection to the search and seizure of documents from 3379 Peachtree Road, for which the government agents had obtained a warrant. He vigorously asserts, however, that the search of 1819 Peachtree Road and the seizure of records therefrom was in violation of his Fourth Amendment rights.[3] The court agrees.

An initial question is whether the agents had a warrant for the search of 1819 Peachtree Road. The only warrant which was obtained was for a search of "the premises known as suites 777 and 870 of a building located at 3379 Peachtree Road, Atlanta, Fulton County, Georgia, the same being the principle business offices of" Fitts Cotton Goods, etc. What the agents did not know was that Fitts Cotton Goods had moved its principle business office to 1819 Peachtree Road. However, even though there was only one "principle (sic) business office" of Fitts Cotton Goods, the warrant which was obtained applied only to the specific premises stated therein, that is, suites 777 and 870 at 3379 Peachtree Road. The Fourth Amendment itself requires that a search warrant particularly describe the place to be searched, and the description on the warrant could not reasonably be held to cover the office at 1819 Peachtree Road.

The government contends, however, that the search was not in violation of the Fourth Amendment because it was consented to by Brewer. It is defendant Britt's position that Brewer did not have the authority to consent to a search and seizures of the office of Fitts Cotton Goods and that Britt instructed him to produce only the dcouments specified in the warrant and required to be produced by that warrant.

It is probable Britt did not mean for Brewer to take the agents to 1819 Peachtree Road and to allow them to seize the records

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[3] The government has not challenged defendant Britt's standing to object to the search and, as president and majority stockholder of Fitts Cotton Goods, Britt is clearly a person aggrieved by the search. *See United States v. Brown*, 274 F.Supp. 561 (S.D.N.Y. 1967).

at that office. Britt's intent is not, however, controlling. Brewer was the Comptroller of Fitts Cotton Goods, Inc., and as such was custodian of the records, especially as Britt was ill and hospitalized during this period. As Comptroller and custodian of the records, Brewer clearly had authority to consent to a search of the office of the corporation. *See United States v. Antonelli Fireworks Company*, 155 F.2d 631 (2nd Cir. 1946), cert. den., 329 U.S. 742 (1946).

The remaining question then is whether Brewer did actually consent to the search of 1819 Peachtree Road. When the government seeks to uphold a warrantless search on the basis of consent, it must carry the burden of showing that the one who permitted the search did freely and voluntarily give consent. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Consent is to be determined by an examination of all the circumstances. *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965); Orfield, *Criminal Procedure Under the Federal Rules* § 41:24, at 707. The court's determination on consent is a finding of fact which will be overturned on appeal only if clearly erroneous. *Hoover v. Beto*, 467 F.2d 516 (5th Cir. 1972).

One of the crucial distinctions in this area is between true consent and mere acquiescence to the assertion of authority to search. In *Bumper v. North Carolina, supra*, the Supreme Court dealt with a situation where law enforcement officers told the mother of a rape suspect that they had a warrant for the search of her house, where her son also lived. Without seeing or reading the warrant she told the officers to come on in. At the hearing on the motion to suppress the State did not present or rely upon any warrant but instead argued that defendant's mother had consented to the search.

The Court held:

> The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search

has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. *This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.* At 548-549. (Footnotes omitted. Emphasis added.)

It is of course clear that Brewer's permission of, and even cooperation in, the search of 3379 Peachtree Road, for which he was presented with a search warrant, was not "consent" within the meaning of *Bumper*. The question, however, is whether Brewer gave full and voluntary consent to the subsequent search of 1819 Peachtree. The danger here is that the fact of the authority to search 3379 Peachtree Road may have appeared to Brewer as authority for the search of 1819 Peachtree Road as well. The search warrant on its face authorized the seizure of the business records of Fitts Cotton Goods, Inc., most of which were at 1819 Peachtree Road.

Excerpts from the testimony of Brewer indicate that he allowed the officers to search 1819 Peachtree Road in compliance with the warrant for 3379 Peachtree Road which called for seizure of the business records of Fitts Cotton Goods.

Mr. Read (attorney for defendant Britt): Now, I will ask you, please, sir, what were the circumstances involved in your going down to 1819 Peachtree Road?

Well, let me put it to you this way: did you volunteer to go down there, or were you asked to go pursuant to the warrant?

Brewer: I think it was joint. I was asked if there were any other records of Fitts Cotton Goods, and I said yes, and I was asked where and I told them.

* * * * * * *

Read: Did you talk with Mr. Britt on the telephone at any time during all this——

Brewer: Yes, sir.

Read: ——goings-on there? Do you remember what he told you?

Brewer: He told me that I would have to abide by the search warrant.

* * * * * * *

Read: Did you then let the agents in and did they take the various items from 1819 Peachtree Road?

Brewer: Yes.

Read: Was that pursuant to the search warrant that you had been exhibited?

Brewer: Yes, sir.[4]

* * * * * * *

Read: If there had not been a search warrant and had not that search warrant been exhibited to you, would you have voluntarily shown any records to anybody coming in the place of business?
Brewer: No, sir.

Brewer is not an attorney and cannot have been expected to understand that the warrant did not cover the documents specified therein if they had been moved to another office. This case is thus quite different from *Hoover v. Beto*, 467 F.2d 516 (5th Cir. 1972), in which the Fifth Circuit upheld on the basis of consent a search conducted pursuant to an invalid warrant. The

[4] At one point earlier in his testimony, Brewer answered "No, sir" to a similar question as to whether the search of 1819 Peachtree was pursuant to the warrant. However, from listening to the testimony and observing the witness, the court is convinced that the first answer to that question resulted from a slip of the tongue or a misunderstanding of the question. The court believes that the questions and answers cited in this order truly represent Brewer's testimony.

defendant there was an experienced trial attorney who, when presented with the warrant, invited the officers into his house and said that the warrant would not be necessary. The court emphasized the attorney's knowledge of his constitutional rights and the fact that he had *invited*, rather than merely permitted the search.

In the present case Brewer certainly did not invite the search of 1819 Peachtree. His statement that his going to 1819 Peachtree was in part voluntary meant, in this situation, acquiescence rather than invitation. He did not resist the officers, answered their questions freely and did cooperate in conducting them to the office and letting them in with the key. He felt, however, that this was required because of the warrant and because of Britt's instructions that he abide by the warrant. He clearly testified that he would not have permitted the search of either office if he had not been presented with a search warrant.

The court is well aware of the cases holding that law enforcement officers need not warn a person of his Fourth Amendment rights to refuse to allow a search and to require the officers to obtain a warrant before conducting a search. *United States v. McCann*, 465 F.2d 147 (5th Cir. 1972); *United States v. Resnick*, 455 F.2d 1127 (5th Cir. 1972). Failure to give such warnings does not necessarily invalidate consent to a search. It is also clear that consent to a search does not have to be in writing to be valid. *Hoover v. Beto, supra; United States v. Resnick, supra; United States v. Boukater*, 409 F.2d 537 (5th Cir. 1969).

In the other extreme, it is of course clear that there can be no true consent where the officials have misrepresented their legal authority to search or where they have in any way used trickery, deceit or coercion to induce consent. *See United States v. McMann*, 417 F.2d 519 (2nd Cir. 1969). There is no contention here that the agents used force or coercion, or that they expressly

misrepresented to Brewer the extent of the warrant which they held.

Neither the court nor the parties have found a case dealing with the unusual situation presented by this case. Here the agents had a valid warrant to search one office, which did not, upon inspection, contain all the documents which they were seeking. They then sought to continue the search to another location. The custodian of the records acquiesced in the search of the first office and continued to cooperate with the officers in the search of the second office.

Based on the testimony of Brewer, Decker[5] and Britt, the court holds that the government has failed to carry the burden of proving that Brewer freely and voluntarily consented to the search of 1819 Peachtree Road. There is no indication that he had any understanding that the warrant did not compel him to

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[5] Special Agent Decker testified at the hearing that Brewer fully consented to the search of 1819 Peachtree Road after making a telephone call. Upon cross-examination Decker became confused as to whether the documents seized from 1819 Peachtree Road were listed on the return of the search warrant or were merely listed in a receipt given Brewer by Decker. As a result of this confusion it became clear that the government had failed to prepare for this hearing to the extreme of failing to notify Decker that he would be needed to testify. Decker conceded on the stand that he had not even reviewed his report on this search since shortly after the search over a year before. Even after examining the report on the stand Decker continued to insist that the return on the warrant listed the documents seized from both offices. After the hearing the government sought to amend Decker's testimony by means of an affidavit in which Decker stated that only the documents seized from 3379 Peachtree Road were listed on the return of the warrant. Defendant Britt objected to this maneuver and the court has refused to consider the affidavit of Decker. The government's motion to reopen the evidence for further testimony from Decker is denied.

The government's failure to prepare adequately for this hearing and the resultant discrediting of Decker's testimony requires the court to give less weight to Decker's testimony on the issue of voluntariness than it might ordinarily have been inclined to do. Relevant also to the problem of resolving conflicts between the testimony of Decker and Brewer is the fact that Brewer has not been charged in the indictment.

allow the search of 1819 Peachtree Road. It would have been a simple matter for the officers to have asked him to sign a written consent to search; in this way they could have ensured that he understood his legal rights and they could likewise have assured the validity of the search. It is clear to the court that Brewer did not consent to the search of 1819 Peachtree but merely acquiesced therein, within the meaning of *Bumper v. North Carolina, supra.*

The government has raised the question whether it can now obtain by subpoena the documents suppressed by this order. The starting point for consideration of this issue is *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920), in which the Supreme Court determined that the essence of the prohibition forbidding the obtaining of evidence by an illegal search violative of the Fourth Amendment "is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." The Court went on to say that "If knowledge of [facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Thus it is clear that the government cannot return the suppressed documents and then use information gleaned as a result of the illegal search to enable it to obtain the same documents through subpoena, discovery, etc. The question not resolved by *Silverthorne,* however, is whether the government may subpoena documents of which it had knowledge prior to the illegal search.

In *Lord v. Kelley,* 223 F. Supp. 684 (Mass. 1963), appeal dismissed 334 F.2d 742 (2nd Cir. 1964), cert. den. 379 U.S. 961, the court held that the suppressed documents were available to the government through subpoena or appropriate warrant, so long as the method and facts used to obtain the documents were in no way tainted by the prior illegal search and seizure. The court there stated:

> The only ground for suppressing the use of these records in evidence is not to allow the Government to gain advantage from violating the Bill of Rights and those high standards of fair play which should govern men entrusted with official power. The owner of the records is entitled to be as well off as if Flattery had not unlawfully seized those papers, but he is not entitled to be any better off. He is not entitled to gain perpetual immunity from ever responding, in any future criminal proceedings or civil suit or administrative, tax inquiry, to an appropriate summons to produce those records which the tax statute require him to keep and *which before the unlawful seizure the Government knew he had.* 223 F.Supp. 684, 691. (Emphasis added).

This rationale has been approved by the Eighth Circuit as consistent with *Silverthorne* (*Standard Oil v. Iowa,* 408 F.2d 1171 (8th Cir. 1969)) and by the First Circuit in *McGarry's Inc. v. Rose,* 344 F. 2d 416 (1st Cir. 1965), and *McGarry v. United States,* 388 F.2d 862 (1st Cir. 1968). In the latter case the court's discussion bears directly on the present case.

> It is clear to us that this is not a case where an illegal search has revealed unsuspected data which is sought to be blanketed under later "legal" subpoena.
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> * * * * * * * *
>
> To impose the greater sanction of permanent immunization whenever a seizure of ordinary business and corporate records has been invalidated would place an incommensurate burden, on the government, unnecessary for the protection of commercial privacy. 388 F.2d 862, 871.

The court is aware of instances in which courts have ruled records permanently immunized from the government's reach but is not persuaded by the reasoning therein. *See Hinchcliff v. Clarke,* 230 F.Supp. 91 (E.D. Ohio 1963); *Lassoff v. Gray,* 207 F.Supp. 843 (W.D. Ky. 1962).

The government is cautioned, however, that it must be able to prove conclusively that it has an independent untainted basis for the subpoena of the records and it must likewise be prepared to show at trial that its evidence is in no way tainted by the illegal search. *See United States v. Birrell*, 269 F. Supp. 716 (S.D. N.Y. 1967).

In sum, the court has today Granted the motion of defendant Britt for return of the documents seized from 1819 Peachtree Road and for the suppression thereof. The court has ruled that the government may be able to obtain the documents from 1819 Peachtree Road by subpoena, warrant or other legal process if it can show that the information forming a basis for such process is in no way tainted by the illegal search and seizure.

IT IS SO ORDERED.

This, the 29 day of May, 1973.

RICHARD C. FREEMAN
United States District Judge

APPENDIX F

United States District Court
Northern District of Georgia
Atlanta Division

The United States
vs.
Robert E. Britt, et al.

Criminal Action
No. 27916

Order

(Filed August 1, 1973)

This prosecution charges six defendants in twenty-seven counts with causing individuals to travel in interstate commerce in execution of a scheme to defraud, in violation of 18 U.S.C. § 2314.

The court today held a hearing pursuant to defendant Britt's motion to quash and dismiss the government's subpoena duces tecum of certain records of Fitts Cotton Goods, Inc.[1]

The court hereby orders the United States Attorney to return immediately all those items which F.B.I. Agent Decker testified at the April 3, 1973, hearing were taken from the Fitts Cotton Goods office at 1819 Peachtree Road. Any copies of such items should likewise be immediately returned.

The motion to quash and dismiss the government subpoena is Denied. Standard Oil v. Iowa, 408 F.2d 1171 (8th Cir. 1969).

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[1] The court held a hearing in this case on April 3, 1973, pursuant to defendant Britt's motion to suppress. See, Order of May 29, 1973.

The court grants the defendant 10 days to assemble the items named in the subpoena and Orders that the items be brought to the clerk's office of this court for inspection by the parties. Rule 17(c), Fed. R. Crim. P.

It IS SO ORDERED.

This, the 30th day of July, 1973.

RICHARD C. FREEMAN
United States District Judge